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No. ——

IN THE

Supreme Court of the United States

RICHARD M. DALEY, *et al.*,
Petitioners,

v.

CLUB MISTY, INC.,
doing business as TEQUILA ROADHOUSE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a referendum procedure that allows voters of a precinct to decide if liquor should continue to be sold at a particular address in their precinct deprives liquor licensees of property without due process.

PARTIES TO THE PROCEEDING

The petitioners are Richard M. Daley, Mayor and ex officio Commissioner of the Liquor Control Commission of the City of Chicago; James Laski, Clerk of the City of Chicago; the Board of Election Commissioners of the City of Chicago; and the City of Chicago. The State of Illinois Liquor Control Commission was named as a defendant in one of the two consolidated cases, but advised the district court that it would not participate in the case and is not a petitioner in this Court. The respondents are Club Misty, Inc., d/b/a Tequila Roadhouse; and Alberto Bedoya, d/b/a Casanova's, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Richard M. Daley, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, at 1a-20a, is reported at 208 F.3d 615 (7th Cir. 2000). The district court's opinion, App., *infra*, at 21a-58a, is reported at 37 F. Supp. 2d 1056 (N.D. Ill. 1999).

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2000. A timely petition for rehearing was denied on May 25,

2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1994).

STATUTES INVOLVED

Section 9-2 of the Illinois Liquor Control Act, 235 ILCS 5/9-2 (1998), is set out at App., *infra*, at 64a-67a. Sections 9-10 and 9-11, 235 ILCS 5/9-10, 9-11 (1998), providing additional referendum procedures, are set out at App., *infra*, at 67a-70a.

STATEMENT

The Illinois Liquor Control Act expressly provides that "[a] license shall be purely a personal privilege, good for not to exceed one year after issuance, . . . and shall not constitute property . . . ." 235 ILCS 5/6-1 (1998). One means by which the Act authorizes termination of licenses is by referendum under section 9-2, which provides that upon a petition signed by not less than 40% of the registered voters in any precinct of Chicago, a referendum shall be placed upon the ballot at the next election asking whether the sale at retail of alcoholic beverages shall be prohibited at a particular address. *Id.* 5/9-2. If a referendum passes, the voters may, also by referendum, remove the prohibition, but they may not place such a proposal on the ballot for 47 months after passing the prohibition. See *id.* 5/9-10 & 5/9-11.[1] The Liquor Control Act also allows voters to vote their entire precinct dry; to place such a referendum on the ballot requires only 25% of the signatures of the registered voters in the precinct. See *id.* 5/9-2.

Respondents, Club Misty, Inc., d/b/a Tequila Roadhouse ("Club Misty"); and Alberto Bedoya, d/b/a Casanova's, Inc. ("Casanova's"), each filed complaints for declaratory and injunctive relief challenging the constitutionality of the referendum procedure authorized by section 9-2. Signatures

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[1] This single-address referendum option was added to the Act in 1994, replacing a prior provision that permitted referenda targeted at a single establishment rather than a single address. The single-establishment referendum option was invalidated in *87 South Rothschild Liquor Mart v. Kozubowski*, 752 F. Supp. 839 (N.D. Ill. 1990).

were collected in November 1998 from 209 of Club Misty's neighbors, which was at least 40% of the voters registered in the precinct, for a referendum to prohibit the sale of liquor at Club Misty's address, and the measure was certified for submission to voters in a February 1999 election. Club Misty filed suit on December 15, 1998, alleging that the referendum procedure constituted both a due process violation and a bill of attainder. The referendum later passed by at least a majority vote.

A referendum to prohibit the sale of liquor at Casanova's address was placed on the November 1998 ballot, again upon the signatures of at least 40% of its neighbors. This measure also passed, by a vote of 176 to 52. Casanova's filed suit on December 11, 1998, but alleged only a due process violation.

The district court concluded that section 9-2's single address referendum procedure did not offend due process because a liquor license is not property within the meaning of the Due Process Clause, and that section 9-2 was not a bill of attainder. See App., *infra*, at 21a-58a. A divided panel of the Seventh Circuit reversed. While rejecting Club Misty's bill of attainder argument, see App., *infra*, at 2a-4a, the majority held both that a liquor license is property protected by the Due Process Clause, *id.* at 6a, and that the referendum procedure was "ineffectual to destroy constitutional property," *id.* at 7a. Judge Bauer dissented, noting that "[w]hen Illinois exercised its right to control (or ban altogether) the sale of liquor, it opted to create a system of local-option rules," and that in Chicago, that option was conferred by precinct. *Id.* at 15a. And within that precinct, voters could exercise their franchise as they saw fit.

> [S]uch is the price of democracy; the voters may make a choice that their betters may not approve .... The process of democratic government does not rely on stern lectures from the highly educated. The least of us has the right to express himself or herself in the ballot box without deference to the ruling classes.

Id. at 18a.

The City's petition for rehearing en banc was denied, with Judges Bauer and Kanne voting to grant the petition.

REASONS FOR GRANTING THE PETITION

A divided panel of the Seventh Circuit has held that an Illinois statute allowing voters in Chicago to vote an individual liquor license void is unconstitutional, and in so holding has repudiated the conclusion that the Illinois courts have reached about whether a license is property within the meaning of the Due Process Clause. This unseemly conflict alone merits this Court's review. But beyond that, the court of appeals' decision also deprives communities of a crucial mechanism to protect the quality of life in their neighborhoods. Targeted referenda that determine where liquor may and may not be sold enable the community to control its own destiny, and are a critical tool for stabilizing troubled communities.

There is an urgent need for guidance from this Court in this area of the law. Across the country, the state and federal courts are at a loss to decide when a liquor license is property within the meaning of the Due Process Clause. The decisions present marked conflict, with state courts (and state legislatures) generally attempting—in vain—to insist on the States' power under the Twenty-First Amendment, and federal courts rather routinely casting aside the limits that the States have chosen to impose on the privilege of selling liquor. But the federal courts themselves struggle with whether discretion in the licensing process means that a license is not property in the constitutional sense; the decision below recognizes a property interest in a liquor license under a regulatory scheme that would not create a property interest in either the Eighth or Tenth Circuits. Thus, there is a conflict among the circuits, and between other state and federal courts, as well as between the state and federal courts in Illinois. Before this unseemly and important conflict is permitted to stand, or create more friction between the federal courts and the state courts and legislatures, this issue should be settled by this Court.

In addition to the uncertainty and outright conflict in this area—which alone meant that the Illinois General Assembly, for example, could not rely on a settled line of decisions of the courts of its state going back nearly a century—the decision below should be reviewed because it deprives state and local governments of an important option for regulating the sale of liquor. The disproportionately large number of liquor outlets in the inner city measurably contributes to a higher crime rate, especially homicide, physical violence, drug dealing, graffiti, loitering, and prostitution. The targeted referendum at issue in this case addresses the problems presented by the sale of liquor at a particular location in a more focused, effective, and prompt way than any other means yet developed. And it empowers the very communities most directly affected by these establishments, and most knowledgeable about their effects on the stability of the surrounding neighborhood. If this important regulatory device may not be used, that ruling should come from this Court.

Review by this Court will disclose, moreover, that the result reached by the Seventh Circuit's majority is not faithful to this Court's decisions. Under a referendum procedure, liquor licensees hold their licenses at the pleasure of the electorate, as the state statute at issue makes clear. Thus, licensees have no vested rights sufficient to create a property interest. The Seventh Circuit was wrong in concluding otherwise, and that error amply justifies review by this Court.

1. The court of appeals' majority acknowledged not only that the Illinois General Assembly has declared by statute that liquor licenses convey no vested right, but also that a long line of decisions of the Illinois Appellate Court have held that a liquor license is not "property" for purposes of the Due Process Clause. See App., *infra*, at 5a (citing *Blue Cat Lounge, Inc. v. License Appeal Commission*, 667 N.E.2d 554, 557 (Ill. App. Ct. 1996); *Ole, Ole, Inc. v. Kozubowski*, 543 N.E.2d 178, 181-82 (Ill. App. Ct. 1989); *Ross v. Kozubowski*, 538 N.E.2d 623, 626

(Ill. App. Ct. 1989); *Black Knight Restaurant, Inc. v. City of Oak Forest*, 513 N.E.2d 109, 111 (Ill. App. Ct. 1987)). As the Illinois Appellate Court explained in *Ross*, "[f]or more than 80 years, the courts of this State have . . . steadfastly held that a license to sell alcoholic beverages is not a right, but rather, a privilege, subject to regulation under the police powers of the State, and that, as such, it is not afforded due process protection." 543 N.E.2d at 181. Indeed, the principle that liquor licenses are not property for constitutional purposes because they can be terminated by referendum was first established by the Illinois Supreme Court in *People v. McBride*, 84 N.E. 865, 872-73 (Ill. 1908).

Unfortunately, the decision below is not the first time that the state and federal courts have come to opposite conclusions about whether the discretion inherent in a state referendum procedure means that liquor licensees have no constitutionally protected property interest. The Sixth Circuit struck down an Ohio statute also providing for targeted referenda in *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991), cert. denied, 506 U.S. 820 (1992), although the Ohio courts had long held that a license is not property, see, *e.g.*, *State ex rel. Zugravu v. O'Brien*, 196 N.E. 664 (Ohio 1935). The district court in New Jersey, similarly, broke ranks with numerous New Jersey Supreme Court opinions and ignored a very clear statute indicating that "[u]nder no circumstances . . . shall a license, or rights thereunder, be deemed property"; that federal court held that a referendum reducing the hours of operation of taverns by two hours a day deprived licensees of property within the meaning of the Due Process Clause. *Sea Girt Restaurant & Tavern Association, Inc. v. Borough of Sea Girt*, 625 F. Supp. 1482 (D.N.J.), aff'd mem., 802 F.2d 448 (3d Cir. 1986).[2] And the district court in Georgia held that even applicants for liquor licenses have a protectable property interest merely because

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[2] The court did uphold the referendum process, finding that it provided due process. See 625 F. Supp. at 1489-91.

state law requires municipalities to "set forth ascertainable standards" to govern the issuance of a license, even though the state statute clearly provides that each "local governing authority is given discretionary powers within the guidelines of due process set forth in this Code section as to the granting . . . of the . . . license." See *McCollum v. City of Powder Springs*, 720 F. Supp. 985, 989 (N.D. Ga. 1989).

This disarray simply reflects the broader problem emerging from the States' exercise of their local prerogative under the Twenty-First Amendment to make their own choices about how to regulate liquor. There is considerable uncertainty about how to reconcile discretion in the licensing process with the notion of a property interest in the license within the meaning of the Due Process Clause. Even though many States create highly discretionary licensing systems, they are frequently told that they have unintentionally created a property interest—and thus must now provide the full array of procedural due process protections. As one commentator discusses at length, "[s]tates differ widely, even within their own boundaries, as to whether a liquor license is treated as property for all purposes." Shelley Ross Saxer, *License to Sell: Constitutional Protection Against State or Local Government Regulation of Liquor Licensing*, 22 Hastings Const. L.Q. 441, 452 (1995). For this reason as well, the decision below, with its nationwide implications, amply merits this Court's review.

2. The need for this Court's intervention is not confined to the conflict between the state and federal courts on whether liquor licenses are property. The federal courts of appeals are themselves in conflict about how to evaluate the role of discretion in the licensing process. The approach taken in the decision below, as well as in the Sixth Circuit's decision in *Brookpark Entertainment*, is inconsistent with decisions of the Eighth and Tenth Circuits.

In *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190 (10th Cir. 1999), the court considered a claim by

holders of federal grazing permits ("the FLLC") asserting a property interest in those permits. Some of these permits were changed when they were renewed to limit the amount of forage cattle could consume, and some were changed after they were renewed. The court noted federal pronouncements stating that such permits do not convey "any right, title, interest, or estate in the public lands or resources" and were thus mere licenses to use federal land, not vested rights in that land. See *id.* at 1196. Where the government "has not explicitly created a property right in a permit, we ordinarily look to the degree to which the federal government has restrained its own discretion relating to that permit." *Id.* at 1197. And because "Congress expressly allowed the Forest Service to alter the terms and conditions of the permits after the completion of [an environmental] analysis, FLLC cannot successfully premise a legitimate claim of entitlement to the terms and conditions of the permits as issued." *Id.* at 1201.

Similarly, the court in *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716 (8th Cir. 1995), considered a challenge to the state's refusal to renew a bingo hall license. Under Minnesota law, an applicant for a state bingo license must submit with the application a resolution of approval from the municipal authority. At the time, Little Canada had an ordinance allowing only one bingo hall to operate at a time. Although Movers Warehouse had obtained the city's approval for renewal of its state bingo hall license for several years, in 1993, the city did not approve Movers Warehouse's application and instead approved an application from another operator. The court rejected a claim of property interest in the state license because it was dependent on the city's approval, and, by ordinance, the city could refuse to issue, renew, or revoke a license "for any reason." Even though the applicant was otherwise entitled to renewal of its state license, the municipality's "unfettered discretion" to block renewal of the license meant that Movers Warehouse had "failed to show that

its expectation of renewal of its state license rose to the level of a property interest created by state law." *Id.* at 719.

Both of these cases reason that where the set of laws governing a license confers specified entitlements on the licensee but also complete discretion on someone—whether the licensing authority itself or another entity—to alter or eliminate those entitlements, the licensee holds nothing amounting to a property interest. Here, of course, Illinois has chosen to confer that discretion on the voters of a precinct to decide whether to suffer the sale of liquor at a particular address. As the court of appeals itself acknowledged, there are no standards to guide such a decision. See App., *infra*, at 8a-11a. But while the Sixth Circuit in *Brookpark* and the Seventh Circuit in the decision below have concluded that a wholly discretionary process for voiding a liquor license does not deprive that license of the attributes of "property" for constitutional purposes, that view cannot be reconciled with the law in the Eighth and Tenth Circuits.

The uncertainty in this area should be ended. State legislatures are entitled to clear rules about what types of regulatory schemes require individualized notice and opportunity for hearing. Here, the Illinois General Assembly relied on a settled view of constitutional requirements articulated by its state courts, only to find its handiwork invalidated by the federal courts. And other States considering measures that empower local communities through referenda will necessarily find it difficult to evaluate the constitutionality of those measures, given the disarray in the law. In the face of such uncertainty, and the risk of large money damages awards against local licensing officials if they close a licensed business in reliance on a referendum later held unconstitutional, innovation will be stifled. Thus, this Court's review is amply warranted.

3. The decision below also misapplies this Court's precedents concerning the character of a "property" interest

entitled to protection under the Due Process Clause. Constitutionally protected entitlements "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); accord, *e.g.*, *Bishop v. Wood*, 426 U.S. 341, 344 & n.7 (1976). To have a protected property interest in a particular benefit, such as a liquor license, state law must accordingly confer more than "a unilateral expectation"; only a "legitimate claim of entitlement" invokes due process protections. *Roth*, 408 U.S. at 577. Thus, in *Roth* this Court held that a public employer's refusal to renew a teacher's contract at its termination infringed no property interest of the teacher, who had "no possible claim of entitlement to reemployment." *Id.* at 578.

A referendum law like the one at issue here similarly defeats a claim of property interest. Under section 9-2, the rights conferred by a liquor license include no legitimate claim of entitlement to retention of the license; at any election, the voters exercise unfettered discretion to place on the ballot a referendum asking whether a licensee's premises should be voted dry. The statute at issue here could not be clearer on this point. Section 9-2 of the Liquor Control Act explicitly empowers the voters in any Chicago precinct to vote a single address dry. See 235 ILCS 5/9-2 (1998). And if the voters do, the liquor license for any establishment at the street address "shall be void." *Id.* Because licenses are held at the pleasure of the electorate, they confer no entitlement that amounts to a protected property interest.

The court of appeals nevertheless found that the statute conferred a property interest on liquor licensees. Relying on its prior decision in *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983), the majority observed that a number of rights are conferred on a liquor licensee prior to the point that the

license can be voided by referendum—in particular, the rights to have a license renewed absent a finding that the licensee is unqualified, or the premises unsuitable, for a liquor license, as well as the right to retain the license during its term unless it is revoked or suspended for cause after a hearing. See App., *infra*, at 1a-2a, 4a-6a.[3] The court of appeals then concluded that section 9-2 did not deprive liquor licenses of their status as property because "[i]t creates no new substantive criteria for the grant or withdrawal of Illinois liquor licenses" and, in particular, did not "alter the 'for cause' condition [for license revocation] that makes those licenses property within the meaning of the due process clause." App., *infra*, at 7a. But this observation misses the point. The reason section 9-2 "creates no new substantive criteria" for the withdrawal of a license is that it creates a mechanism for the termination of the license without application of any substantive criteria—namely, the unfettered discretion of the voters to void any license they choose. Section 9-2 is thus the antithesis of "substantive criteria" for withdrawal of a license. And that, of course, is precisely why licensees lack any entitlement under Illinois law sufficient to support a due process claim. A license held only at the voters' complete discretion is simply not securely held.

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[3] In *Reed*, the Seventh Circuit had held that the refusal to renew a liquor license issued under Illinois law was a deprivation of property within the meaning of the Due Process Clause. See 704 F.2d at 948-49. This holding lacked practical significance, however, because the Illinois Appellate Court had already construed state law to require a hearing when a licensing authority decided not to renew a liquor license. See *City of Wyoming v. Liquor Control Commission*, 362 N.E.2d 1280 (Ill. App. Ct. 1977). Moreover, the authority of *Reed* was quickly questioned by the Seventh Circuit itself, which observed, in a decision the following year, that *Reed* had not considered the voters' discretionary authority to void liquor licenses by referendum, and that, by virtue of this broad power, it might well be that a referendum infringes no constitutionally protected property interest. See *Philly's v. Byrne*, 732 F.2d 87, 90-91 (7th Cir. 1984). See also App., *infra*, at 6a-7a.

The Seventh Circuit's holding, accordingly, is inconsistent with this Court's opinion in *Roth*, which points out that when state law grants entitlements during a specific term, if those entitlements must be renewed periodically, then a failure to grant renewal does not work a deprivation of property. Whatever entitlement licensees may have under Illinois law between elections, they have no entitlement to keep their license should the electorate decide to exercise its right to vote the license void.[4]

Moreover, the decision in *Roth* should make plain why the discord between the state and federal courts on the question whether a liquor license confers a property interest within the meaning of the Due Process Clause should be especially troubling. As *Roth* makes clear, the question whether a statutorily conferred interest is a sufficiently secure entitlement to amount to property in the constitutional sense turns on state law. For this reason, federal courts should be especially reluctant to reject the conclusion of the state legislators and state courts in this area. That is yet another basis on which to question the approach of the Seventh Circuit is this case, as well as the approach of the Sixth Circuit in *Brookpark Entertainment*, and it makes the conflict between the state and federal courts on this point all the more unseemly.

4. Beyond the need for guidance in this area of the law, the court of appeals' decision in this case poses serious problems

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[4] This point explains why *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the only decision of this Court the court of appeals' majority cited in support of its holding on this point, is inapposite. In that case, under applicable state law, public school teachers had a right to retain their tenured positions absent a finding of cause for discharge, and for that reason, this Court held that they enjoyed a "property" interest in their positions for constitutional purposes, despite their lack of a right to formal notice and opportunity to be heard prior to discharge. See *id.* at 538-41. Here, however, applicable state law grants licensees no protection from the voters' unfettered discretion to void a liquor license.

for municipalities struggling to address the problems associated with the sale of alcoholic beverages. By invalidating this provision of the Liquor Control Act, the court has deprived municipalities of an important community-driven mechanism to regulate the sale of liquor—and thereby safeguard the health, safety, and welfare of their neighborhoods. The community voice is the one that controls the referendum process, and it will often be the best judge of the local impact of an establishment that sells liquor. As Judge Bauer so powerfully remarked in his dissent, neighborhoods and communities "have no recognized political existence," but "it is there that Chicagoans live, marry, raise families, socialize and die . . . . Stability of neighborhood and safety are their primary objectives." App., *infra,* at 14a. Judge Bauer recognized that the "precinct" is the neighborhood's "closest parallel"—it in a sense gives political existence to the neighborhood. *Id.* at 15a. And because of the need for local control of neighborhoods, especially in a city the size of Chicago, the Illinois legislature empowered precincts to make their own decisions about the health, safety, and welfare of their communities. See *ibid.* This is a classic instance of the State's exercise of its traditional police power "to prohibit the sale of alcoholic liquor in inappropriate locations." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996). This procedure also creates an entirely healthy incentive for licensees to avoid externalizing the costs associated with their operation onto the surrounding community.

Such policy decisions by state legislatures should not be lightly cast aside. There is a statistical relationship between the number of liquor outlets and a variety of ills especially prevalent in the inner city: a higher crime rate, including homicide and physical injury; drug dealing, graffiti, loitering, and prostitution; divorce, child abuse, and domestic violence. See Shelley Ross Saxer, *"Down With Demon Drink!": Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, 35 Santa Clara L. Rev. 123, 124 (1994). See also Shelley Ross Saxer, *License to Sell, supra*, at 444 n.10 ("high

correlation between the number of liquor stores and a neighborhood's crime rate"; "liquor contributes to 80% of the homicides and 60% of the injuries in African-American and Hispanic dominated inner-cities"; "[i]n roughly one-half to two-thirds of homicides and serious assaults, alcohol is found in the perpetrator or victim, or both") (citations omitted). But as it happens, the relationship between taverns and crime is a highly individualized one. As a comprehensive analysis of crime patterns in Chicago demonstrates, only certain establishments create crime problems for the surrounding community. See Richard L. Block & Carolyn Rebecca Block, *Space, Place and Crime: Hot Spot Areas and Hot Places of Liquor-Related Crime*, in Crime and Place: Crime Prevention Studies 149-76 (John E. Eck & David Weisburd eds., 1995). The referendum process gives the affected community the ability to address these problem establishments; and, by empowering the community, such measures ultimately strengthen the hand of those fighting to stabilize troubled neighborhoods.

In essence, a targeted referendum is an aspect of zoning, which "may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). The "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976). And the referendum is doubly powerful because it not only protects quality of life but does so at the behest of, and according to the standards of, the community itself. Indeed, the referendum device is likely used to settle issues of liquor regulation more than any other, and for more than 100 years. See, *e.g.*, *Ohio ex rel. Lloyd v. Dollison*, 194 U.S. 445 (1904) (local option prohibiting sale of liquor); *Rippey v. Texas*, 193 U.S. 504 (1904) (same); *Sea Girt Restaurant*, 625 F. Supp. at

1484 (referendum regarding hours of liquor sales); *Rutherford Lodge No. 547, B.P.O.E. v. Hock*, 63 A.2d 893 (N.J. Super. A.D. 1949) (referendum regarding sales of alcoholic beverages for on-premises consumption under certain club licenses); *Walinski v. Mayor and Council of City of Gloucester*, 95 A.2d 625 (N.J. Super. Ct. 1953) (referendum regarding sale of liquor on Sundays); *Thompson v. McKinley County*, 816 P.2d 494 (N.M. 1991) (local option prohibiting sale of liquor from drive-up windows); *Jellico v. Conner*, 65 S.E. 725 (S.C. 1909) (local option to determine whether dispensaries closed in certain counties should be reopened); *Taylor v. Armentrout*, 632 S.W.2d 107 (Tenn. 1981) (referendum regarding sale of liquor for on-premises consumption).

The panel majority seemed to think that license revocation adequately protected the community's interest, but it should be easy to grasp the defects in the revocation process from the community's perspective. The community must first convince local prosecutors to devote the resources to building a case for revocation in light of the many competing priorities that such officials face. Even if a case is brought and succeeds at the local level, it is ultimately reviewed by regulatory officials not directly accountable to the residents of an affected community. In Illinois, as in most States, a local decision to revoke a license may be set aside by a state agency, the majority of whose members are appointed by the Governor. Thus, communities are forced to depend on the judgment of persons far removed from the concerns associated with the establishment in question, and who are not only unaccountable to the residents living in the affected neighborhoods, but far more likely to be influenced by the liquor lobby than the welfare of individual neighborhoods.[5]

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[5] The upshot of the panel decision is especially problematic since voters determined to close a particular establishment are left only with the option of voting their entire precinct dry—a procedure upheld in this circuit, see *Philly's*, 732 F.2d at 90. If the community is forced to implement its will by voting the entire precinct dry, the result can only be unduly harsh for other licensees in the precinct who have posed no concerns at all to their

On these questions of policy, the panel majority's primary concern was that a vote by an establishment's neighbors to determine the continued validity of its liquor license would constitute an "electoral free-for-all" that "might result in serious errors that a due process hearing would avert." App., *infra*, at 10a. Of course, as Judge Bauer pointed out,

> such is the price of democracy; the voters may make a choice that their betters may not approve .... The process of democratic government does not rely on stern lectures from the highly educated. The least of us has the right to express himself or herself in the ballot box without deference to the ruling classes.

Id. at 18a.[6]

To be sure, in this case the General Assembly did not confer unfettered discretion on licensing officials to revoke licenses,

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neighbors, but simply have the bad luck to be in a precinct with one problematic address. If the concern is due process, that result cannot possibly be preferred. A licensee that is disturbing its community should at least expect to be voted dry; a licensee that is the neighbor of that licensee should have no such expectations. As Judge Bauer remarked, the single-address local option allows "businesses which have decent regard for the preservation of the community standards [to] remain and their property rights not [be] scuttled by a bad apple in the liquor dispensing barrel." App., *infra*, at 17a.

[6] If the petition is granted we will also urge our submission—embraced by Judge Bauer in dissent—that even if a liquor license should be treated as property, then the referendum supplies licenses due process. Because the licensing issue in this case is a zoning decision, it may be made by referendum even when only a single parcel is involved. See, *e.g.*, *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976); *Southern Alameda Spanish Speaking Organization v. Union City*, 424 F.2d 291, 294 (9th Cir. 1970); *Taylor Properties, Inc. v. Union County*, 583 N.W.2d 638, 643 (S.D. 1998); *Florida Land Co. v. City of Winter Springs*, 427 So. 2d 170, 174 (Fla. 1983). And the California Supreme Court has extended this rule to cases in which the parcel's owner is deprived of a use to which it was previously entitled. See *Arnel Development Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980). The panel's holding is in conflict with this decision. See App., *infra*, at 11a-13a.

and thus did not subject licensees to the whim of those regulators. Instead, the legislature required licensees to keep their communities satisfied according to neighborhood standards, aspirations, and needs. This country's history of liquor regulation by referendum should preclude any suggestion that the Constitution forbids requiring a licensee to be a good neighbor.[7]

In sum, the panel majority's decision has announced a new property right in Illinois, in conflict with a line of decisions of the state courts, and then relied on that new-found right to invalidate a critical provision of the Liquor Control Act, enacted because the Illinois General Assembly determined that the license revocation process is insufficient to protect the public health, safety, and welfare of communities where liquor is sold. This decision also conflicts with decisions in the Eighth and Tenth Circuits, and displays an unfortunately typical reaction by federal courts to the States' attempts to limit the entitlements flowing from liquor licenses. Now, more than ever, such activism in matters of liquor is intolerable; governments and residents alike need these community-driven tools, especially in the inner cities. For these reasons, the Court should grant the petition for certiorari.

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[7] In any event, if a licensee can establish that the voters voided its license based on arbitrary or invidious reasons, relief will be available under the Equal Protection Clause. See generally *Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074-75 (2000) (per curiam) (irrational denial of municipal services to an individual applicant is actionable).

CONCLUSION

The petition for certiorari should be granted.

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